SEP 25 1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1446

JOAN ROE, PETER POE, and COE PRESS, INC.,
Petitioners,

—v.—

JANE DOE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF MASSACHUSETS *AMICI CURIAE*, AND BRIEF *AMICI CURIAE*

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The respondent having denied consent to the filing of an *amici curiae* brief, the

American Civil Liberties Union and the Civil Liberties Union of Massachusetts hereby move for leave to file the appended brief amici curiae.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated solely to defending the liberties guaranteed by the Bill of Rights. The Civil Liberties Union of Massachusetts is a statewide affiliate of the American Civil Liberties Union confining its membership and activities to the Commonwealth of Massachusetts. The issues in this case involve a conflict between two important civil liberties principles: on the one hand, the right of an individual to protection of that individual's privacy and right to be left alone, and on the other hand, the press's and author's freedom to disseminate ideas and information and the public's right to know. In addition, the Civil Liberties Union of Massachusetts is currently involved in an effort to dissolve an outstanding injunction by the highest state court in Massachusetts against the public showing of a film vitally affecting a topic of great public importance within and beyond the boundaries of Massachusetts, and an opinion by this Court in the instant case might well affect the ultimate outcome of the CLUM's efforts. Accordingly, the purpose of this brief is to suggest principles for the resolution of the competing rights and interests in this case in such a way as to preserve important constitutional values in this and future cases

where First Amendment and privacy claims are in seeming conflict.

Respectfully submitted,

MELVIN L. WULF
Attorney for Movants

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Interest of Amici

The interest of amici is set out in the preceding Motion For Leave To File.

A R G U M E N T

Introduction

This case involves an apparent or potential conflict between two sets of rights, each of which is, to different degrees, entitled to protection. On the one hand, the Petitioners here -- a psychiatrist and lay psychotherapist turned authors for purposes of writing a case history, and their book publisher -- are entitled to the protections afforded by the First and Fourteenth Amendments to the Constitution. On the other hand, modern notions of the right of privacy would seem to afford the Respondents -- a patient of the Petitioners and a subject of the case history that has been suppressed -- some degree of protection. Involved also are the public's right to know, and the public's right to benefit ultimately from advances in medical knowledge and in the state of the psychiatric art which result largely from the publications of case histories such as is involved here. Finally, to the extent that the development of enlightened public opinion regarding psychiatric illness and the treatment thereof are influenced by the widespread dissemination and public availability of such case histories and similar psychiatric literature, then to that extent current and future generations of emotionally disturbed people (already a very substantial segment of the population) would benefit from a

correct resolution of this case.

In addition, the Civil Liberties Union of Massachusetts ("CLUM") has recently adopted a position that is expected shortly to result in an effort to dissolve a seven year old injunction issued by the courts of Massachusetts, prohibiting the public distribution and exhibition of a film entitled "Titicut Follies". A short discussion of the history of this matter is in order to fully explain the CLUM's interest in the case at bar.

The "Titicut Follies" Litigation.

The "Titicut Follies" case involves a documentary motion picture film showing actual events and conditions filmed at the Massachusetts Correctional Institution at Bridgewater, a state hospital and prison for the criminally insane. The film, entitled "Titicut Follies" and made in 1966 by the well-known documentary film-maker Frederick Wiseman, depicted the sordid conditions of that institution, and was banned from distribution or exhibition except to a narrowly limited potential audience consisting of "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity."1/

1/ This language is quoted from the Superior Court's Final Decree After Rescript

The Supreme Judicial Court of Massachusetts imposed the further requirement that if and when the film is shown to such limited, professionally educated and professionally interested audiences, the exhibitor must include in the film for all permited showings "a brief explanation that changes and improvements have taken place in the institution since 1966." Commonwealth v. Wiseman, 356 Mass. 251, 263.

The extraordinary First and Fourteenth Amendment questions presented by such a sweeping prior restraint, based upon asserted private interests and contractual rights perceived by the Commonwealth of Massachusetts and by its Supreme Judicial Court, were presented to this Court in a Petition for Writ of Certiorari,2/ but review was denied, with Mr. Justices Douglas,

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(Massachusetts Superior Court, Equity No. 87538, decree dated and entered July 9, 1969), which follows the opinion and order of the Supreme Judicial Court of Massachusetts affirming the Superior Court's earlier ruling but modifying the decree of that court which would have prohibited any showing of the film whatsoever. Commonwealth of Massachusetts v. Wiseman, 356 Mass. 251, 249 N.E. 2d 610 (1969).

2/ Frederick Wiseman, et al., Petitioners, v. Commonwealth of Massachusetts, et al., Respondents, No. 621, October Term, 1969.

Harlan and Brennan voting to grant review. 398 U.S. 960 (1970). Upon a petition for rehearing, Mr. Justice Blackmun, who had since ascended the Bench, voted with Mr. Justices Harlan and Brennan to hear the case, but since at that point Mr. Justice Douglas did not participate in further proceedings involving the case, a complement of four Justices voting for review was still not achieved. 400 U.S. 954 (1970).

As a result, the general public has been denied the right to see, and Mr. Wiseman has been denied the right to exhibit, an extraordinary film attacking, in the most stark terms, the deplorable conditions at a state "correctional" institution and mental hospital. The film was concededly non-obscene and, since it portrayed actual conditions caught on film, was not false. It was neither on grounds of obscenity nor defamation that the Supreme Judicial Court of Massachusetts prohibited public distribution and exhibition of the film. Rather, that court relied upon a holding that the inmates depicted had a privacy interest in the film's not being shown, and that that interest could be vindicated by the Commonwealth acting as parens patriae. In the course of its opinion, the Supreme Judicial Court noted that "the film gives a striking picture of life at Bridgewater and of the problems affecting treatment at that or any similar institution " Commonwealth v. Wiseman, 356 Mass. 251, 262. The Court goes so far as to note that in 1967 -- the year after Wiseman made his film -- there

were "some improvements in conditions at Bridgewater," including much-needed additions to the custodial and treatment staffs. 356 Mass. at 260, n. 8. Yet the Court held that since "the record does not indicate to us that any inmate shown in the film, by reason of past conduct, had any special news interest as an individual," 356 Mass. at 260-61, and since there were in the film "recognizable pictures of individuals in "naked or in other embarrassing situations," 356 Mass. at 260, and since "valid" releases and consents were not obtained from each and every inmate pictured in the film, injunctive relief was appropriate.3/

3/ The consent issue furnished a sort of "Catch-22" for the Wiseman petitioners. On the one hand, the Supreme Judicial Court professed concern for the fact that Wiseman had not obtained, in writing, consents from each inmate pictured. The Court questioned the validity of those releases Wiseman had obtained, on the ground that such a release would have effect only if "the inmate giving it had seen the film and fully understood how he was to be portrayed." 356 Mass. at 260, n.9. Of course, since all or nearly all of the inmates at Bridgewater were presumptively non compos mentis, none of them could be competent to sign a valid release. Thus, the Commonwealth -- the party most embarrassed by the film's revelations -- would have to decide, as parens patriae for the inmates, whether or not to give such releases. The Court so held

While the Court professed that it gave "no weight to any direct interest of the Commonwealth itself in suppressing the film," 356 Mass. at 259, nevertheless the Court required that whenever Wiseman showed the film to one of the enumerated professional audiences, he inform the audience that conditions have improved at the institution since the film was made. 356 Mass. at 263. Since Wiseman has been unwilling to make such a statement, which he considers to be untrue, he has refrained from showing the film even to limited professional audiences. 4/ Thus, a film of vast educational, social and political potential,

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despite the fact that not a single inmate pictured objected to being filmed, as Wiseman specifically refrained from filming those inmates who did object.

4/ One result of the controversy over the film was the initiation of an emergency review procedure to look into the status of many of the inmates of Bridgewater, many of whom were found to be erroneously or needlessly incarcerated and were released. This action indicates the Commonwealth's sensitivity to criticism even by a suppressed film. One can only speculate on what improvement might have been made in the treatment of the criminally insane in Massachusetts had the film not been suppressed.

as well as artistic merit, 5/ has remained dormant for seven years.

It is this situation that various parties interested in the film and in vindication of First Amendment interests are planning to rectify by legal action to be initiated in Massachusetts. It appears likely that in the case at bar, this Court might well touch upon issues and decide questions which would inevitably have some effect upon the dissolution of the "Titicut Follies" injunction.

5/ The first public showing was at the New York Film Festival at Lincoln Center in New York City on September 28, 1967. It was awarded the first prize as the best documentary film at the Mannheim Film Festival in 1967. National Educational Television wanted to show the film. The then Attorney General of Massachusetts, Mr. Elliott Richardson, found the film to be "impressive" and "powerful" and said at the trial that it "overwhelmed" him. The Supreme Judicial Court apparently recognized that "the seemingly random and somewhat incoherent sequence of scenes" had method to it and was "not likely to confuse seriously interested professional and student audiences" and might be "highly informative to such specialized audiences." 356 Mass. at 262, n.11. Unfortunately, the Court did not credit the general public with such

A PRIOR RESTRAINT SUCH AS APPEARS IN THIS CASE IS VIRTUALLY UNPRECEDENTED AND HAS NO SANCTION FROM OR BASIS IN ANY OPINION OF THIS COURT.

The Petitioners in this case correctly point out in their brief (at 3) that the courts of the State of New York took an "absolutely unprecedented" action in enjoining distribution and sale of "a concededly truthful and non-obscene book, concerning matters of great scientific and medical importance." A similar case, involving a film rather than a book, in Massachusetts, occurred where the Supreme Judicial Court of the State enjoined exhibition to the general public of a concededly non-obscene, truthful film depicting the sordid conditions at a state-run prison and hospital for the criminally insane. See Commonwealth v. Wiseman, 356 Mass. 251 (1969). In both cases, the state courts purported to base their decisions on what they perceived to be a privacy right residing in the persons depicted in the works sought to be published -- in one case the subject of a psychoanalysis, and in the other case the involuntarily confined criminally insane. In both cases the state courts, without denying the existence of a legitimate public concern with the subject matter, nevertheless held that the plaintiffs' private

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abilities to understand and comprehend the artistic methods employed in a fine documentary film.

interests justified the issuance of prior restraint against publication, distribution and exhibition.

Perhaps the most remarkable aspect of the state courts' treatment of the case at bar was the fact that, notwithstanding the lower court's factual finding that the identity of the Respondent was sufficiently disguised in accordance with the standards of the psychiatric profession in writing case histories (A 84-5), she was nevertheless entitled to relief. The trial court judge limited that relief to an injunction against distribution of the book in public, commercial channels, as opposed to channels "reasonably calculated to be addressed to scientific readers," since "the claimed scientific value of the disclosure" outweighs the respondent's right to ban all distribution whatsoever. It appears that the only ground advanced by that court for the partial injunction is that "[w]hen confidential information is learned, in confidence, under a contract that it shall not be disclosed,...an injunction will lie to restrain the unauthorized disclosure." (A-83.)

The Supreme Court, Appellate Division, First Department, citing "the expanding recognition of invasion of privacy actions" and "the confidentiality accorded to the physician-patient relationship" (A-104), broadened the relief to prohibit any and all distribution of the book. The Court of Appeals, most remarkably of all, affirmed without dissent, noting only in the amended

decision that the "prior restraint" doctrine was not violated by the broader injunction (A-128).

To affirm these decisions is to expand the doctrine of prior restraint considerably further than this Court has ever done before. Prior restraint must inevitably rob the public, or some substantial class of persons, of whatever valuable results emerge when a "marketplace of free ideas" is allowed to deal with difficult, controversial, dangerous, or unacceptable social problems, illnesses, and related matters of public interest. Abrams v. United States, 250 U.S. 616, 630 (1919); Time, Inc. v. Hill, 385 U.S. 374, 406 (1967).

This Court has tolerated prior restraints only in the obscenity cases, where the Court has said publication has no public importance and is outside the First Amendment. Kingsley Books, Inc. v. Brown, 354, U.S. 436 (1957). Compare New York Times v. United States, 403 U.S. 713 (1971).

The Respondent in the case at bar would have this Court carve out a new exception to the rigid rule prohibiting prior restraints on publication to include cases in which arguable privacy claims are advanced. The potential abuses of this additional exception are nowhere more clear than in the "Titicut Follies" case. The Supreme Judicial Court of Massachusetts, while treating the issues in more detail than did the New York trial court, nevertheless treated the weighty

First Amendment claims in an equally cavalier manner. The Court admitted the scientific 6/ importance as well as the quality of the documentary film, and even noted that no inmate appearing in the film objected to its exhibition and that the film probably helped the inmates by prompting improvements at the institutions. While it is true that steps were not taken to disguise the faces of inmates pictured therein, the court did not suggest that exhibition would be approved if such steps were taken.7/

6/ The court did not speak to the political importance of the film, although such importance must have been in the court's mind when it insisted in its order that should the film be shown at all to the audiences permitted by the opinion, the exhibitor had to make clear that the conditions (for which the state was obviously responsible) had improved since the making of the film.

7/ There are obviously steps that might be taken by a filmmaker to disguise names, or faces, or persons depicted in a film. Of course, disguising faces might have a detrimental effect upon the ability of the film to make a substantial impact upon the viewer. This whole question never arose, however, in view of the Supreme Judicial Court's failure at any point to inquire into the possibilities of a "less restrictive alternative" to a total ban on showing the film to lay audiences.

This factor, combined with the court's concern that at limited permissible "professional" exhibitions the audiences be informed that conditions at Bridgewater had improved, betrays what appears to be the true interest of that court -- to prevent widespread embarrassment to the government of Massachusetts and its departments of corrections and mental health. Furthermore, the court made no effort to inquire as to whether any of the inmates pictured might have preferred whatever invasion of privacy was entailed by the showing of the film, in exchange for whatever improvement to the institution or enhancement of their chances for release the film might have prompted. There was no evidence that any person shown in the film was incompetent to give knowledgeable consent or to object to his being filmed or to the film's being exhibited. The court merely assumed that none of the inmates could make any judgment as to what was in his best interest, and that only the state could decide that critical question.

Certainly the material involved in the publication in the case at bar, as well as the film "Titicut Follies", involves an even stronger public interest than did the story of James Hill and his family, Time, Inc. v. Hill, 385 U.S. 374. Even a person who involuntarily falls into a situation where a public interest is suddenly created, must suffer some exposure to the public, 8/

8/ "Exposure of the self to others in

provided, of course, that there is no intentional falsification by the publisher. See, e.g., Jenkins v. Dell Publishing Co., 251 F.2d 447 (3rd Cir. 1958), cert. den. 357 U.S. 921; Warren & Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 214 (1890); 9/ Organization for a Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971); Public Utilities Commission v. Pollack, 343 U.S. 451.

While privacy interests are critical, and indisputably in need of protection, prior restraint is not the appropriate vehicle. The individual's right to privacy is indeed a most important right in a civilized society. But the protection of that right should not take the form of the obstruction of the public's right to know. Privacy rights should be vindicated by civil post-publication remedies appropriately limited by doctrines such as that in

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varying degrees is a concomitant of life in a civilized community. The risk of exposure is an essential element in a society which places a primary value on freedom of speech and press." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967).

9/ "The right to privacy does not prohibit any publication of matter which is of public or general interest." 4 Harv. L. Rev. 26 214.

New York Times Co. v. Sullivan, supra, and Time v. Hill, supra, or by lawsuits designed directly to protect the right to privacy without unduly restricting the public flow of information. Cf. Griswold v. Connecticut, 381 U.S. 479; Roe v. Wade, 410 U.S. 113 (1973); Nader v. General Motors Corp., 25 N.Y. 2d 560.

Prior restraints are particularly odious and inappropriate in cases such as these, since they effectively create a criminal penalty where, in the absence of court interference, only a civil penalty is envisioned. While civil penalties awarded in post-publication suits for libel, invasion of privacy, or breach of contract, would in some cases tend to discourage future free exercise of the right to publish freely (see New York Times Co. v. Sullivan, supra), it is clear that the imposition of criminal penalties in connection with the court's contempt power poses an even greater threat to First Amendment rights. It is said that prior restraint acts against the publication rather than the publisher. By transforming civil penalties into criminal ones, it effectively devastates both. This Court has recently acknowledged that even mere civil damages when awarded in excessive amounts in the form of exemplary damages, have an unduly devastating effect on First Amendment rights. Thus the Court has held that in the absence of liability based on knowledge of falsity or reckless disregard of truth, where the state-imposed standard for liability in libel cases is less

demanding than the rule of New York Times v. Sullivan, supra, or Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), only actual, and not exemplary, damages may be awarded. Gertz v. Robert Welch, Inc., ___ U.S. ___ 42 U.S.L.W. 5123 (1974). See also Mr. Justice Brennan's opinion for a plurality of the Court as well as Mr. Justice Marshall's dissent in Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). Indeed, even in cases in which individuals have been found to be hurt (unlike the case at bar and in the "Titicut Follies" case), the Court has foreclosed post-publication damages where there has been substantial public interest in the event and where it was impractical or inappropriate to obtain written releases. Thus individuals were prevented from recovering for publication of personal and embarrassing photographs and information in Kelly v. Post Publishing Co., 327 Mass. 275, 98 N.E. 2d 286 (1951)(fatal accident); Metter v. Los Angeles Examiner, 35 Cal. App. 2d 304, 95 P. 2d 491 (Dist. Ct. App. 1939)(suicide of relative); Jenkins v. Dell Publishing Co., 251 F.2d 477 (3rd Cir. 1958)(death by brutal assault).

There is no justification, in fact or in law, for the prior restraint imposed in this case by the New York Courts. A very heavy burden should be placed upon a party seeking a prior restraint of publication, requiring that in this case the injunction be dissolved. Nor would it be appropriate for the Court in the case at bar to vacate

the order of the New York Court of Appeals and re-instate the lower court order allowing only distribution in "professional" scientific channels. This "solution," which was adopted by the Supreme Judicial Court in Titicut Follies, treats the general public much too shabbily and reflects an elitist philosophy which is foreign to our national thinking. Dissemination of material of vital public interest has never, by edict of this Court, been limited to "educated" audiences. See DeJonge v. Oregon, 299 U.S. 353, 365 (1937); Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 684 (1968).10/

This Court has consistently made plain its strong aversion to prior restraints. See New York Times v. United States, supra. Nonetheless, the Court is asked by the Respondent to engraft a new exception to the rule, based on a purported invasion of an individual's privacy.

Such an exception to the prior restraint rule, if adopted by this Court, will emasculate the prior restraint prohibition and inflict a heavy blow to the exercise of First Amendment freedoms. After all, what

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10/ This situation is distinguishable, of course, from a case where a certain "vulnerable" class of persons might be protected from certain material, such as where statutes prohibit dissemination of certain "adult" materials to minors.

do authors write about, and film makers film, if not about people, private individuals who either are public figures, or who are not public figures but might be on their way toward becoming such, or who are entirely unknown but whose life circumstances are of interest to the general public.

The logical result of such a doctrine could easily be a spate of cases such as "Titicut Follies" where the privacy rights of individuals are interwoven with the political concerns of a government, and where the one is used to obfuscate the other. In Commonwealth v. Wiseman, 356 Mass. 251 (1969), there was a relatively shallow intrusion on the privacy of the inmates that was scarcely a fraction of the degree of intrusion and disruption that such an institution inflicted on them each and every day of their incarceration.

A broad rule prohibiting prior restraints in these cases is required. As this Court has noted in a related area, ad hoc balancing by individual judges of the public interest as against privacy rights is an inappropriate if not dangerous approach to the First Amendment. Gertz v. Robert Welch, Inc., ___ U.S. ___, 42 U.S.L.W. 5123, 5129 (June 25, 1974).

CONCLUSION

For the reasons stated above, the decision below should be reversed.

Respectfully Submitted,

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September 1974

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MICHAEL RODAK, JR., CLERK

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AFFIRMATION IN OPPOSITION

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AFFIRMATION IN OPPOSITION

EPHRAIM S. LONDON, an attorney

admitted to practice in this Court, states:

1. I am the attorney for the Respondent in this case and make this statement in opposition to the motion of the American Civil Liberties Union and the Civil Liberties Union of Massachusetts for leave to file a brief as amici in support of the Petitioners' position.

2. The motion is opposed because the application is not timely, and because the brief relates primarily to an issue not properly before the Court. It may be added that the brief would be of little help to the Court. The amici suggest at page 14 of their brief that the appropriate remedy for the wrong to Respondent is open discussion in "the market place of free ideas." In this case, the sale of a book by a psychiatrist was enjoined because the book disclosed

intimate details of the patient's life and thoughts confided to the psychiatrist during treatment. We do not understand how the wrong to the patient could be remedied by open discussion of the circumstances of the patient's life or of her treatment by the psychiatrist.

3. Although the motion for leave to file a brief does not make any reference to the fact, the amicus brief is, as stated before, offered in support of the Petitioners' position. The Petitioners' brief was due and was served (after two extensions of time) on August 2, 1974. Under subdivisions 2 and 3 of Rule 42 of the Rules of this Court, the motion for leave to file the proposed brief should have been filed on or before August 2, 1974. The motion was served September 23, 1974. The amici do not offer an explanation of

the late application. They were aware of the proceeding a sufficient time before August 2nd to have completed their brief before that date. The attorney for the Petitioners in this case is one of the counsel for the amicus, American Civil Liberties Union. The American Civil Liberties Union was also aware of this case long before August 2, 1974 because its affiliate, the New York Civil Liberties Union, had been asked to file a brief when the case was on appeal to the New York Court of Appeals. After hearing both counsel, the New York Civil Liberties Union determined that it ought not to intervene in support of the position of the Petitioners or the Respondent. The American Civil Liberties Union reached its decision to intervene without consulting with the attorneys for the Respondent.

4. There would be very little reason to accept the amicus brief even if the motion for leave to appeal had been timely. The amicus brief is concerned primarily with a stated conflict between the right of privacy and freedom of speech or press. (See motion papers at pages 1 to 3.) As set forth in the Respondent's brief (at pages 13 to 15), that question is not properly presented for review in this case.

Dated: September 23, 1974

EPHRAIM S. LONDON